No. 08-1366

Supreme Court, U.S.
FILED
JUL 2 3 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN P.W. ROSCH,

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Washington, Division 1

RESPONDENT'S BRIEF IN OPPOSITION

DAVID S. MCEACHRAN
(*Counsel of Record*)
Whatcom County
Prosecuting Attorney
311 Grand Avenue, 2nd Floor
Bellingham, Washington 98225
(360) 676-6784

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether electing to pursue the administrative process in a forfeiture matter after being informed of the option to pursue the matter in a court of competent jurisdiction waives a due process challenge to the impartiality of the adjudicator of the administrative forfeiture hearing.

2. Whether an administrative forfeiture proceeding adjudicated by a sheriff's designee violates due process because the sheriff is permitted by state statute to keep the property or ninety percent of the proceeds from its sale where the designee's salary is not dependent on the outcome of the hearing, the proceeds are deposited into a fund administered by the county prosecutor and any expenditures are approved by the superior court.

3. Whether a claim that Washington's forfeiture statute violates the separation of powers doctrine because it permits the seizing agency to adjudicate the administrative hearing presents a federal question.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	3
1. Rosch's election to pursue an administrative remedy over a judicial process waived his constitutional challenge to Whatcom County's administrative forfeiture hearing process	5
2. The Whatcom County Sheriff's forfeiture procedure is constitutional under *Dugan v. State of Ohio*	9
3. Rosch's separation of powers issue under *Coolidge v. New Hampshire* does not raise a federal question	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

FEDERAL AUTHORITIES

Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley, 114 F.3d 840 (9th Cir. 1997) 13

Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009) 10

Commonwealth of Northern Mariana Islands v. Kaipat, 94 F.3d 574 (9th Cir. 1996) 10, 13

Connally v. Georgia, 429 U.S. 245 (1977) 9, 10, 11

Consolidated Rendering Company v. State of Vermont, 207 U.S. 541 (1908) 16

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 5, 14, 15, 16, 17

Dreyer v. People of State of Illinois, 187 U.S. 71 (1902) 16

Dugan v. State of Ohio, 277 U.S. 61 (1928) ..... *passim*

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 6, 7

Gete v. Immigration and Naturalization Service, 121 F.3d 1285 (9th Cir. 1997) 6, 7, 8, 9

Johnson v. Zerbst, 304 U.S. 458 (1938) 6

Stewart v. LaGrand, 526 U.S. 115 (1999) 7

Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997), *cert. denied*, 520 U.S. 1241 (1997) 10

TABLE OF AUTHORITIES – Continued

Page

Ward v. Monroeville, 409 U.S. 57 (1972) 9, 10, 11, 12, 13

Withrow v. Larkin, 421 U.S. 35 (1975) 10, 16

WASHINGTON STATE SUPREME COURT

In Re the Application of Borchert, 57 Wn.2d 719, 359 P.2d 789 (1961) 6, 7

WASHINGTON STATE COURT OF APPEALS

Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, *rev. denied*, 107 Wn.2d 1016 (1986) 14, 15, 16

Lowery v. Nelson, 43 Wn. App. 747, 719 P.2d 594, *rev. denied*, 106 Wn.2d 1013 (1986) 14, 15, 16

OTHER AUTHORITIES

Agomo v. Fenty, 916 A.2d 181 (D.C. 2007) 14

STATUTES

28 U.S.C. §1257 1

28 U.S.C. §1257(a) 1

RCW 69.50.505 ..... 2, 3, 5, 8

JURISDICTION

Petitioner Rosch cites 28 U.S.C. §1257 as the basis for this Court's jurisdiction. In order for a federal claim to be properly asserted under 28 U.S.C. §1257, the claim must have been "specially set up or claimed under the Constitution or treaties . . . of the United States." 28 U.S.C. §1257(a). While Rosch asserts that all his issues arise under the United States Constitution, his separation of powers claim regarding Washington's forfeiture statute does not present a federal question.

STATEMENT OF THE CASE

On July 12, 2005,[1] a Chevrolet pickup truck was seized by members of the Northwest Regional Drug Task Force. Memorandum in Opposition to Motion for Summary Judgment at 2, Ex. 1. Rosch was provided with notice of the seizure and the intention of the Whatcom County Sheriff to forfeit the vehicle. Id. The notice advised Rosch that he was entitled to a reasonable opportunity to assert his claim of ownership before Sheriff William Elfo or the Sheriff's designee. He was also advised that he had the option of removing the matter to a court of competent jurisdiction for resolution and that the administrative

[1] The Court of Appeals opinion states that the truck was seized on the 13th, however the forfeiture notice sent to Rosch stated it was the 12th.

hearing and any appeal therefrom would be in accord with Washington's Administrative Procedures Act. Attached to the notice was a copy of Washington's forfeiture statute, RCW 69.50.505. Id.

On September 22, 2005 Rosch represented himself at the hearing before the Undersheriff for Whatcom County, Sheriff Elfo's designee. Memorandum in Opposition at 2. Testimony at the hearing showed that at least one of the controlled substance transactions in which the truck had been used predated the July 6, 2005 date when Rosch became the registered owner of the vehicle. The Undersheriff decided that the vehicle was forfeited as of the date it was used to facilitate a controlled substance transaction and that there had been no ownership interest in the vehicle to transfer to Rosch. Petitioner's claim of ownership was therefore denied. Id.

On October 17, 2005 Rosch filed a petition for judicial review of the Undersheriff's decision and later amended the pleading to add a Uniform Declaratory Judgment Act claim. At summary judgment the State did not contest the return of Rosch's truck, but asserted that Rosch's declaratory judgment claim should be denied. Memorandum in Opposition. The trial court granted the petition for judicial review and ordered the truck returned to Rosch, but denied his declaratory judgment claim and associated attorney's fees. August 4, 2006 Order at 2.

Rosch's declaratory judgment claim was premised upon the unconstitutionality of Washington's

forfeiture statute as applied within Whatcom County. Under Whatcom County's procedure, the Supervisor of the Northwest Regional Drug Task Force handles the forfeitures of seized assets as well as currency. Memorandum in Opposition Ex. 3. He deposits forfeited currency and proceeds of forfeited property into the Whatcom County Drug Fund, which fund is administered by the Whatcom County Prosecutor. Expenditures from the fund are initiated by motion of the Prosecutor and occur only with the approval of the Whatcom County Superior Court, via an order. Id. Expenditures from the Drug Fund are strictly in accord with those authorized in RCW 69.50.505(10). Id.

The Whatcom County Sheriff's Office does not have any direct access to the fund. Id. Monies from the fund have been allocated to the Whatcom County Sheriff's Office as reimbursement for employees hired as replacements for officers assigned to the Northwest Regional Drug Task Force in accord with RCW 69.50.505(10). Id. Such expenditures represented only a small fraction in 2006, 2.3 percent, of the entire budget of the Whatcom County Sheriff. Id.

REASONS WHY THE PETITION SHOULD BE DENIED

Rosch asserts that Washington's forfeiture law, RCW 69.50.505, violates due process under the 5th and 14th Amendments because of an alleged

pecuniary interest of the law enforcement officer adjudicating the forfeiture hearing. The statute, however, provides a claimant the option to remove a forfeiture matter to a court of competent jurisdiction, and Rosch was specifically informed of this option prior to deciding to proceed with an administrative hearing on the matter. Rosch's election of an administrative remedy waived his current constitutional challenges to the administrative process. If Rosch had desired the full due process protections afforded by the United States Constitution, Rosch could have chosen to pursue his claim in court. The Court of Appeals correctly decided that Rosch waived his constitutional challenges to the administrative process by choosing to pursue that more informal remedy over the judicial process.

In challenging the constitutionality of Washington's forfeiture statute on due process grounds before this Court, Rosch neglects to mention the specifics of the forfeiture procedures in Whatcom County. While the Sheriff does, and did, designate a deputy within the Sheriff's Office to adjudicate the forfeiture hearings, the proceeds from the sale of any forfeited property are deposited into the Whatcom County Drug Fund, a fund administered by the Whatcom County Prosecutor. Any expenditures from the Drug Fund must be approved by the Whatcom County Superior Court. The administrative process followed in Whatcom County clearly falls within circumstances that do not implicate due process concerns under this Court's precedent in *Dugan v. State of*

Ohio, 277 U.S. 61 (1928). Under Whatcom County's procedures any indirect pecuniary interest the Undersheriff may have is too attenuated to render the forfeiture statute as applied in Rosch's case unconstitutional.

Rosch also asserts a separation of powers claim citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). However, as Rosch's claim is based on application of a state statute, it does not raise a federal question. *Coolidge* is predicated on search warrants issued pursuant to the Fourth Amendment. This case does not involve the issuance of a search warrant. Therefore, *Coolidge* does not apply to Whatcom County's administrative forfeiture process and does not provide a basis for granting certiorari.

1. Rosch's election to pursue an administrative remedy over a judicial process waived his constitutional challenge to Whatcom County's administrative forfeiture hearing process.

Rosch asserts that the provisions in RCW 69.50.505 allowing for the seizing law enforcement agency to benefit from the forfeiture as well as to adjudicate the administrative forfeiture proceeding violates due process under the 5th and 14th Amendments to the United States Constitution. The trial court and the Court of Appeals ultimately found that Rosch had waived his constitutional challenges by electing to pursue the administrative hearing process

over the judicial process based on the Washington case of *In Re the Application of Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961). Rosch asserts that the *Borchert* decision is wrong, based on the Ninth Circuit case of *Gete v. Immigration and Naturalization Service*, 121 F.3d 1285 (9th Cir. 1997). In the *Gete* case it was the utter lack of any procedural safeguards within the Immigration and Naturalization Service ("INS") administrative process that led the court not to apply the doctrine of waiver. The *Gete* case acknowledged that generally when one elects an administrative remedy, they may not later claim that they have been unlawfully deprived of the safeguards associated with proceeding judicially. Id. at 1294. Rosch's election of an administrative remedy, one that is governed by Washington's Administrative Procedures Act, plainly falls within the doctrine of waiver. The Court of Appeals did not err in finding that Rosch had waived his constitutional challenges to the administrative procedures.

It is well settled that constitutional rights may be forfeited and/or specifically waived in both the criminal as well as civil context. For certain fundamental rights, *e.g.*, the right to counsel, waiver requires the intentional relinquishment or abandonment of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). For other non-fundamental rights, failure to assert the right forfeits or waives the right. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring). Expressly consenting to one tribunal over another can

waive constitutional challenges to the tribunal chosen. *See*, *Freytag*, 501 U.S. at 893-901 (Scalia, J. concurring) (petitioner's express consent to a special trial judge instead of a Tax Court judge waived right to challenge the appointment of the special trial judge on constitutional grounds);[2] *cf.*, *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (defendant's election for execution by lethal gas, where he was provided option of lethal injection, waived his constitutional objection to execution by lethal gas). Along the same lines, *Borchert* held that the defendant's election to proceed with his case before a justice of the peace compensated on a fee basis by statute, when he had expressly been given the option to change venue to a salaried judge, constituted a knowing and intelligent waiver of any possible bias arising from the statutory compensation scheme. *Borchert*, 57 Wn.2d at 725-26.

Rosch relies upon *Gete*'s rejection of a waiver analysis under the facts of that case to assert that his election here did not waive his due process claim. The Court of Appeals distinguished *Borchert* from *Gete* on the grounds that the fee justice system at issue in *Borchert* provided sufficient safeguards against bias or prejudice, while there were no safeguards in the administrative process against arbitrary or clearly unconstitutional actions in *Gete*.

---

[2] Despite the waiver argument, the majority concluded that the case was "one of those rare cases" in which they should exercise the Court's discretion to hear a nonjurisdictional constitutional claim. *Freytag*, 501 U.S. at 878-79.

Petitioner's Appendix A at 11-A. Likewise, the forfeiture procedures utilized in Rosch's case are distinguishable from those condemned in *Gete*. In *Gete*, the court found that the administrative review process occurred "under procedures lacking all semblance of due process." *Gete*, 121 F.3d at 1287. Under the INS administrative process, all the claimant was entitled to was an interview with an immigration official who decided whether the government lacked probable cause to seize the property or if the owner had proved that the property was not subject to forfeiture under the law. Id. at 1290. The review of the immigration official's decision did not include a review of the probable cause determination and the process did not allow for any judicial review of the INS forfeiture decision. Id. The court was also concerned the claimants had not been notified that they would be waiving all of their rights under the Constitution and subjecting themselves to a process that might not even be minimally fair. Id. at 1294.

Here, in addition to providing the right of removal to a judicial setting, Washington's forfeiture statute provides for an administrative hearing and appeal conducted in accord with Washington's Administrative Procedures Act under Title 34. RCW 69.50.505(5). By choosing the administrative remedy here, Rosch did not unwittingly waive all of his constitutional rights or agree to a process that was "not even minimally fair." The administrative procedures here were and are "reasonable procedures" to provide a claimant with a reasonable opportunity to

be heard, all that is required to meet due process in the administrative hearing context. *Gete*, 121 F.3d at 1297.

Rosch was informed of his option to remove the forfeiture proceeding to a court of competent jurisdiction and was provided a copy of the statute setting forth the State's forfeiture process. Rosch's decision to choose an administrative process that he argues was inherently biased, with knowledge of his option to proceed in a court of law, waived his due process challenge to the administrative process.

2. The Whatcom County Sheriff's forfeiture procedure is constitutional under *Dugan v. State of Ohio*.

Rosch claims that Washington's forfeiture statute violates due process because of the pecuniary interest the statutory scheme creates for the adjudicator of the administrative hearing. Rosch does not assert actual bias, but an indirect pecuniary benefit that violates due process under *Connally v. Georgia*, 429 U.S. 245 (1977) and *Ward v. Monroeville*, 409 U.S. 57 (1972). *Connally* is not relevant as it involved an issue of direct pecuniary benefit to the adjudicator. The Whatcom County administrative forfeiture process is also distinguishable from the facts in *Ward* because any indirect pecuniary benefit is insubstantial and too remote as to violate due process.

The Due Process Clause of the United States Constitution requires disqualification of judges in two

instances, one where the judge has a personal financial interest in the outcome of the proceeding and the other involving criminal contempt cases. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2259-61 (2009). The Court in *Caperton* extended this due process concern to circumstances where there was no demonstration of actual bias but allegations of conflict of interest resulting from financial incentives. In *Caperton* the court found that the "extreme facts" of that case, involving substantial contributions from a party appearing before the judge to that judge's election campaign and the apparent effect they had on the outcome of the election, posed a "serious risk of actual bias." Id. at 2263-64. As noted by the dissent in that case, however, not all issues of judicial disqualification implicate United States Constitutional concerns. Id. at 2268 (Roberts, J. dissenting).

Officials assigned the duties of adjudication are presumed to be unbiased. *Withrow v. Larkin*, 421 U.S. 35, 47, 55 (1975). The mere fact that an adjudicative body derives a financial benefit from the penalties it imposes does not violate due process. *Van Harken v. City of Chicago,* 103 F.3d 1346, 1353 (7th Cir. 1997), *cert. denied*, 520 U.S. 1241 (1997), *citing Dugan v. Ohio*, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed.2d 784 (1928); *accord*, *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996).

Rosch relies upon *Connally v. Georgia*, 429 U.S. 245 (1977) and *Ward v. Monroeville,* 409 U.S. 57 (1972), for his claim that the Whatcom County Sheriff's Office administrative process violates due

process. In *Connally*, the justice of the peace was entitled to a fee when he approved a warrant application but received no compensation when he reviewed and denied one. *Connally*, 429 U.S. at 246. It was the direct, personal, and substantial pecuniary interest of the judge in the outcome of his decision that rendered the procedure unconstitutional. Id. at 250. Here, however, there is no question that the Undersheriff does not personally, nor directly, receive any financial benefit from his decision in the forfeiture hearing. Thus, the circumstances in *Connally* are distinguishable from the Whatcom County administrative hearing procedures.

In *Ward v. Monroeville*, the fines, fees and costs imposed for the offenses adjudicated in the traffic court presided over by the village mayor represented a major source of income for the village, between 35 and 50 percent of the village's income for the period considered. *Ward*, 409 U.S. at 58. In finding a due process violation, the court found that the mayor's executive responsibilities for village finances were such that they could make him partisan in order "to maintain the high level of contribution from the mayor's court." Id. at 60.

Unlike the mayor in *Ward* the Undersheriff's relationship to the pecuniary interest is too remote to warrant a presumption of bias. The Whatcom County Sheriff does not directly receive the proceeds from the sale of forfeited property. All of the proceeds are deposited into the Whatcom County Drug Fund. The Sheriff has no executive responsibilities for or over

the fund, which is administered by the Whatcom County Prosecutor. The Whatcom County Sheriff, let alone the Undersheriff, does not have independent access to the Drug Fund, nor is it an account within the general budget of the Whatcom County Sheriff. Expenditures are only made with the approval of the Whatcom County Superior Court. Any expenditures from the Drug Fund to the Sheriff are mainly to provide reimbursement for employees hired as replacements for Sheriff personnel deployed to the Northwest Regional Drug Task Force. Moreover, the amount of funds the Sheriff's Office receives through the Drug Fund is not a significant portion of the Sheriff's budget, 2.3 percent in 2006, nowhere near the 35 to 50 percent at issue in *Ward*. The Undersheriff does not have any of the wide ranging executive powers that warranted a presumption of partisanship in *Ward*.

The procedure utilized in Whatcom County is more analogous to and clearly constitutional under *Dugan v. State of Ohio*, 277 U.S. 61 (1928). In *Dugan* the defendant, claimed that the mayor court system there was unconstitutional because half of the fines imposed from convictions found by the mayor were paid into the city treasury. Id. at 62. However, unlike the mayor in *Ward*, the mayor had no executive functions and was but one of five commissioners exercising legislative power for the city. Id. at 63. The mayor received no fees from the convictions and his salary was set by the other members of the commission. In concluding that there was no due

process violation, the court emphasized that the mayor's salary was not dependent upon whether or not he convicted defendants. Id. at 65. Although the mayor's salary was paid out of the fund into which the fines from the mayor's court were paid, it was a general fund and the mayor had no executive authority over it. Id. The court found the mayor's relationship to the fund too remote to constitute a due process violation. Id.

Here, the Undersheriff's connection to the forfeited funds is too remote to implicate due process concerns. As in *Dugan*, the Undersheriff receives a salary no matter what his decisions are in the administrative forfeiture hearings. His salary isn't even paid out of the fund into which the proceeds of the forfeitures are paid. The Undersheriff also has no direct control over the expenditure of funds from the Drug Fund, neither does the Sheriff. The Undersheriff's relationship to the forfeiture proceeds is even more remote than that in *Dugan*. *See also*, *Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997) (where Board was both adjudicator and executor of its finances, a financial incentive of upwards of five percent of its budget in the outcome of adjudications was not a sufficiently strong institutional motive to reasonably warrant fear of partisan influence on the judgment); *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996) (fact that legislature earmarked funds received from fines imposed by judges for judicial facilities did not create

an interest that violated due process where judges did not have responsibility for or control over the Judicial Building Fund); *Agomo v. Fenty*, 916 A.2d 181 (D.C. 2007) (where there was no evidence that hearing examiners' salaries were contingent upon findings of liability or that their salaries were affected by the District's budget, no due process violation based on alleged pecuniary interest).

The actual administrative procedures applied in Whatcom County for forfeitures comply with due process. The adjudicator, the Undersheriff, has no direct pecuniary interest in the administrative hearing, and any indirect pecuniary interest is too remote under *Dugan* to implicate due process.

3. Rosch's separation of powers issue under *Coolidge v. New Hampshire* does not raise a federal question.

Rosch asserts that the forfeiture statute also violates the separation of powers doctrine. The combination of the Undersheriff's adjudicatory and investigatory functions regarding forfeitures has been held not to violate the separation of powers under the Washington cases of *Smith v. Mount*, 45 Wn. App. 623, 726 P.2d 474, *rev. denied*, 107 Wn.2d 1016 (1986) and *Lowery v. Nelson*, 43 Wn. App. 747, 719 P.2d 594, *rev. denied*, 106 Wn.2d 1013 (1986). Rosch relies on *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) for his separation of powers argument, however, *Coolidge* addresses the validity of a search warrant issued by a

non-neutral magistrate under the Fourth Amendment. *Coolidge* does not provide a basis for overruling *Smith* and *Lowery* as settled precedent in Washington. While Rosch now separately references the Fourth Amendment as a basis for finding Washington's forfeiture statute unconstitutional in this regard, he did not assert that theory below and the Fourth Amendment does not contain any separation of powers provision applicable to the states. Rosch's separation of powers issue derives from state law and does not raise a federal question.

The separation of powers doctrine under the United States Constitution does not extend to the states.

> "A local statute investing a collection of persons not of the judicial department, with powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the 14th Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way

> or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty."

Dreyer v. People of State of Illinois, 187 U.S. 71, 83-84 (1902); *see also*, *Consolidated Rendering Company v. State of Vermont*, 207 U.S. 541, 552 (1908) ("There is no provision in the Federal Constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon non-judicial bodies certain functions that may be called judicial."). Furthermore, in a federal setting this Court has acknowledged that the combination of adjudicatory and nonadjudicatory functions, without more, does not create an unconstitutional risk of bias necessarily resulting in a due process violation. *Withrow v. Larkin*, 421 U.S. at 47, 58. The United States Constitution does not proscribe how states may divide powers amongst their branches of government.

Rosch seeks to avoid the result dictated by *Smith* and *Lowery* by relying on selected language from the case of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). He analogizes the situation of the sheriff's office adjudicating a forfeiture claim to *Coolidge* where an attorney general acting as a justice of the peace authorized search warrants in a case in which he had been actively involved in the investigation and which he ultimately prosecuted. The warrants were determined to be invalid under the

Fourth Amendment because they had not been issued by a neutral magistrate. Id. at 449-50, 453. The issue here does not involve the issuance of a search warrant, but determination of a forfeiture claim. *Coolidge* is certainly not controlling precedent to the administrative proceedings in this case.

The United States Constitution does not govern, through the separation of powers doctrine, how states may divide functions among the three entities of government. *Coolidge* is a case limited to Fourth Amendment concerns regarding the issuance of search warrants by neutral magistrates and does not extend to adjudications in other settings. Rosch's separation of powers issue does not present a federal question, and Washington precedent is determinative of this issue.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

DAVID S. MCEACHRAN
(*Counsel of Record*)
Whatcom County
Prosecuting Attorney
311 Grand Avenue, 2nd Floor
Bellingham, Washington 98225
(360) 676-6784
Attorney for Respondent

July 23rd, 2009.